State of California

Memorandum

cc: TO BRANCH CHIEFS

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To : Regional Board Executive Officers
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Date : OCT 07 1987

/s/ W. R. Attwater
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From : **STATE WATER RESOURCES CONTROL BOARD**

Subject: FEDERAL ANTIDEGRADATION POLICY

This memorandum is intended to provide guidance on the application of the federal antidegradation policy to actions by the State Water Resources Control Board (State Board) and the California Regional Water Quality Control Boards (Regional Boards).

OVERVIEW

Environmental Protection Agency (EPA) Water Quality Standards regulations require that each state have an "antidegradation policy." 40 C.F.R. §§131.6(d), 131.12. Each state's policy must, at a minimum, be consistent with the principles set forth in 40 C.F.R. §131.12 (hereinafter referred to as the "federal antidegradation policy"). This regulation establishes a three-part test for determining when increases in pollutant loadings or other adverse changes in surface water quality may be permitted:

> "(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
> (2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and

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regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected." 40 C.F.R. §131.12(a).

State Board Resolution No. 68-16, the "Statement of Policy with Respect to Maintaining High Quality of Waters in California", satisfies the requirement that the State have a policy which, at a minimum, is consistent with the federal antidegradation policy. The State Board has interpreted State Board Resolution No. 68-16 to incorporate the federal antidegradation policy in situations where the federal antidegradation policy is applicable. State Board Order No. WQ 86-17 at 16-19. State Board Resolution No. 68-16 is part of state policy for water quality control, which guides the regulatory programs for the State and Regional Boards and is binding on all state agencies. See Cal. Water Code §13140 et seq.

The State Board has interpreted State Board Resolution No. 68-16 to incorporate the federal antidegradation policy in order to ensure consistency with federal Clean Water Act requirements. See State Board Order No. WQ 86-17 at 17-18.

Attached are copies of EPA's Questions and Answers on: Antidegradation and EPA Region 9's Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12. These documents can be used as guidance in applying the federal antidegradation policy.

Also attached is a copy of State Board Order No. WQ 86-17. The order discusses the federal antidegradation policy at pages 16-24. EPA provided comments on the proposed order, stating that EPA concurred in the State Board's analysis.

As indicated by the attached material, application of the federal antidegradation policy often will hinge on the specific facts of the case. Thus, it is not possible to provide a definitive exposition as to how the policy should be applied.

The federal antidegradation policy serves as a "catchall" water quality standard, to be applied where other water quality standards are not specific enough for a particular water body or portion of that water body, or where other water quality standards do not address a particular pollutant. The test also serves to provide guidance for standard setting and for other regulatory decisions, to determine when additional control measures should be required to maintain instream beneficial uses or to maintain high quality waters.

The federal antidegradation policy emphasizes protection of instream beneficial uses, especially protection of aquatic organisms. In most cases, where instream beneficial uses will not be impaired and no outstanding National

resource waters will be affected, the federal antidegradation policy is not an absolute bar to reductions in water quality. Rather, the policy requires that reductions in water quality be justified as necessary to accommodate important social and economic development. The outcome will often depend upon a balancing of competing interests, the decision resting in the sound judgment of the State and Regional Boards.

This memorandum provides general guidance as to where the federal antidegradation policy applies, and how the three-part test established by the antidegradation policy should be applied.

I. Applicability of the Federal Antidegradation Policy

The three-part test set forth in the federal antidegradation policy is triggered by reduction in surface water quality. The first step in analyzing the requirements of the federal antidegradation policy as applied to a particular activity is to determine if the activity will lower surface water quality; only if there is reduction in water quality must the three-part test be applied to determine if the activity may be permitted. See EPA Region 9, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12 at 4.

A. Waters of the United States

The federal antidegradation policy is part of EPA's Water Quality Standards regulations. Each State's water quality standards must include a policy consistent with the federal antidegradation policy. 40 C.F.R. §131.6(d). Thus, the State and Regional Boards must apply the federal antidegradation policy to all "waters of the United States" within the State of California. See generally Clean Water Act §§303(e)(3), 502(7), 33 U.S.C. §1313(e)(3), 1362(7); Kentucky v. Train, 9 E.R.C. 1281 (E.D. Ky. 1976).

The term "waters of the United States" is broadly defined, to include essentially all surface waters. See, e.g., Quivara Mining Co. v. United States Environmental Protection Agency, 765 F.2d 126 (10th Cir. 1985) cert. denied ___ U.S. ___, 106 S.Ct. 761 (1986). "Waters of the United States" do not include ground waters. See Exxon v. Train, 554 F.2d 1310 (5th Cir. 1977). Where only ground waters are affected, State Board Resolution No. 68-16 still applies, but does not incorporate the federal antidegradation policy; the State and Regional Boards must apply the general policies set for the State Board Resolution No. 68-16 to changes in ground water quality, but need not address the specific, three-part test established by the federal antidegradation policy. See State Board Order No. WQ 86-17 at 19.

The boundaries of the State of California extend three miles seaward from the coast line. People v. Weeren, 26 Cal.3d 654, 660-61, 607 P.2d 1279, 1281-82, 163 Cal.Rptr. 255, 257-258, cert. denied 440

U.S. 839, 101 S.Ct. 115 (1980); see id. at 622, 607 P.2d 1282-83, 183 Cal.Rptr. at 258-59 (coast line is defined as the ordinary low water mark or the seaward limit of inland waters). See generally United States v. California, 381 U.S. 139, 164, 169-70, 85 S.Ct. 1401, 1415, 1418 (1965) (establishing test for identifying inland waters, a test satisfied by Monterey Bay but not by the Santa Barbara Channel, Santa Monica Bay, or San Pedro Bay); 44 Ops.Cal.Atty.Gen. 135 (1966). Compare Cal. Water Code §13200 with Clean Water Act §502, 33 U.S.C.A. §1362 ("boundaries of the state," for purposes of defining those areas for which water quality standards are required under the Porter-Cologne Water Quality Control Act, include the waters of the "territorial sea," as defined in the Clean Water Act, but do not include waters beyond the three-mile limit, defined as waters of the "contiguous zone" and the "ocean" under the Clean Water Act).

The State may exercise authority over activities beyond its boundaries in order to protect the State's legitimate interests. People v. Weeren, 26 Cal.3d at 666, 607 P.2d at 1285, 163 Cal.Rptr. at 261; see Cal. Water Code §13260(a)(2). But the State's water quality standards, including the state policy incorporating the federal antidegradation policy, extend only to waters within the boundaries of the State. See Clean Water Act §§303(e)(3), 507(7), 507(8), 33 U.S.C. §§1313(e)(3), 1367(7), 1367(8); Cal. Water Code §§13050(e); 13200.

Thus, for offshore discharges, application of the federal antidegradation policy by the State and Regional Boards is triggered only by changes in water quality within the three-mile limit. If there is a change within the three-mile limit triggering application of the federal antidegradation policy by the State and Regional Boards, however, the State and Regional Boards should take into consideration changes in water quality beyond the three-mile limit as part of the public interest balancing required to determine if the three-part test established by the federal antidegradation policy has been satisfied. Cf. State Board Resolution No. 68-16 (requiring that changes in water quality be consistent with the "maximum benefit to the people of the State." In determining what constitutes the maximum benefit to the people of the State, when regulating activities within their jurisdiction, the State and Regional Boards may take into consideration associated impacts on water quality outside the State's boundaries, and how those changes in water quality may affect the legitimate interests of the State.)

Of course, EPA may apply the federal antidegradation policy to offshore discharges, even where there is no change in water quality within the State's boundaries triggering application of the federal antidegradation policy by the State and Regional Boards. See generally Clean Water Act §402(a), 33 U.S.C. §1342(a). When EPA issues a permit for a discharge to the contiguous zone or ocean waters, the permit must apply "the same terms, conditions, and

requirements as apply to a State permit program and permits issued thereunder...." Id. §402(a)(3), 33 U.S.C. §1342(a)(3). States assuming responsibility for the National Pollutant Discharge Elimination System (NPDES) permit program must have and apply a policy consistent with the federal antidegradation policy. See 40 C.F.R. §§122.44(d), 123.25(b), 130.5(b)(1), 130.5(b)(6), 131.6(d). Accordingly, EPA should apply the federal antidegradation policy to any change in surface water quality resulting from any EPA issued NPDES permit.

B. <u>Changes in Water Quality</u>

Application of the federal antidegradation policy is triggered by a lowering of surface water quality. The critical issue in determining whether the three-part test established by the policy must be applied is not the level of treatment provided, but whether receiving waters will be affected.

Thus, the federal antidegradation policy ordinarily is triggered by new discharges or expansion of existing facilities, "[s]ince such activities would presumably lower water quality." EPA, Questions & Answers on: Antidegradation, 6. But an increase in the volume of discharge would not trigger application of the federal antidegradation policy where the increased volume is offset by an increase in the level of treatment, so that there is no lowering of receiving water quality.

Similarly, application of the federal antidegradation policy would be triggered by a reduction in the level of treatment of an existing discharge. See State Board Order No. WQ 86-17 at 20-21.

Substantial relocation of an existing outfall would also trigger application of the federal antidegradation policy since, like a new discharge, water quality presumably will be lowered in the vicinity of the new outfall. See EPA Region 9, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12 at 3.

The requirement that the federal antidegradation policy be applied does not depend upon identification of any discernible impact on beneficial uses. It may be most convenient to think in terms of mass emissions. A substantial increase in mass emissions of a pollutant ordinarily triggers application of the federal antidegradation policy, even if there is no other indication that the waters are polluted. See State Board Order No. WQ 86-17 at 21.

The federal antidegradation policy was promulgated on November 28, 1975. It does not apply to reductions in water quality which occurred before that date. Thus, the federal antidegradation policy ordinarily does not apply to continuation of existing discharges, even if exceptions or variances from other applicable water quality X

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objectives or effluent guidelines are required to permit the discharge to continue.

The federal antidegradation policy is applicable to changes in water quality resulting from either point source or nonpoint source discharges. EPA, Questions & Answers on: Antidegradation 6.

In general, the federal antidegradation policy will also apply to changes in water quality resulting from water diversions. See id. at 11; EPA Region 9, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12 at 4. EPA guidance suggests that in the case of an irreconcilable conflict between a State's water quantity allocations and the federal antidegradation policy, the State's water rights law would prevail. But the two should be reconciled where possible. EPA, Questions & Answers on: Antidegradation 11. For example, it may be possible to offset decreases in water quality resulting from decreases in instream flows by imposing stricter controls on other factors affecting water quality. Id.

Under California water rights law, flow requirements for insteam beneficial uses and effects on water quality are considered as part of water right decisions. See Cal. Water Code §§174, 1243, 1243.5. See generally United States v. State Water Resources Control Board, 182 Cal.App.3d 82, 227 Cal.Rptr. 161 (1986). In particular, the federal antidegradation policy, which has been incorporated into the State's water quality objectives, should be considered as part of water right decisions. See Cal. Water Code §1258; State Board Order No. WQ 86-17 at 17-18 (State Board Resolution No. 68-16, which incorporates federal antidegradation policy, has been adopted as a water quality objective in all sixteen regional water quality control plans.) The public trust doctrine, with its emphasis on protection of instream beneficial uses and public interest balancing, also requires consideration of factors like those set forth in the federal antidegradation policy. See generally National Audubon Society v. Superior Court, 33 Cal.3d 419, 658 P.2d 709, 189 Cal.Rptr. 346, cert. denied, 464 U.S. 977, 104 S.Ct. 413 (1983). In some respects, the public trust doctrine may require even greater protection of instream beneficial uses than would be required to satisfy the federal antidegradation policy. The federal antidegradation policy does not apply to changes in water quality which occurred before the policy took effect in 1975; such changes in water quality can be considered in applying the public trust doctrine.

Thus, it should be possible to harmonize California water rights law and the federal antidegradation policy. State water rights law would prevail if achieving the requirements of the federal antidegradation policy would require a waste or unreasonable use of water. Cf. United States v. State Water Resources Control Board, 182 Cal.App.3d 82, 143-44, 227 Cal.Rptr. 161, 197 (1986) (State Board need not set

standards to maintain the water quality of a water body at a level sufficient for existing offstream use where substitute water supply is provided and maintaining that level of water quality in the water body would require a waste of water.) See generally Cal. Const. Art. X, §2. But California water rights law assigns a high value to protection of water quality and instream beneficial uses. See Cal. Water Code §§243, 1243.5, 1258. Indeed, a diversion may itself be unreasonable, in violation of constitutional prohibition of waste, unreasonable use, or unreasonable method of diversion, if it results in an impairment of instream beneficial uses. See Environmental Defense Fund v. East Bay Municipal Utility District, 26 Cal.3d 183, 605 P.2d 1, 161 Cal.Rptr. 466 (1983). The social and economic benefits of water development may be taken into account as part of the balancing of interests contemplated by the federal antidegradation policy. See 40 C.F.R. §130.12(a)(2).

A conflict between the federal antidegradation policy and the State's proscription of waste or unreasonable use, or between the federal policy and other requirements of California water rights law, appears unlikely. The State Board should apply the federal antidegradation policy as part of its water right decisions.

In summary, the applicability of the federal antidegradation test depends upon whether there is a change in surface water quality. If there is a lowering of water quality, the antidegradation policy applies to all factors which are affecting that water quality. On the other hand, the federal antidegradation policy has no applicability, no matter how degraded a body of water may be, absent some lowering of water quality after the effective date of the policy.

C. Proceedings

The federal antidegradation policy has the potential to be applied to virtually every kind of proceeding where water quality standards are established or where activities which affect receiving water quality are permitted. The policy may apply to either planning activities or to actions on permits for individual discharges. See EPA, Questions & Answers on: Antidegradation 4-5. The federal antidegradation policy is intended to serve both as a guideline for the preparation of water quality standards and as a general water quality standard applicable to other regulatory decisions. See State Board Order No. WQ 86-17 at 19.

1. Planning

The State and Regional Boards have followed the federal antidegradation policy in establishing water quality objectives as part of adoption or approval of water quality control plans. See, e.g., State Board, Lake Tahoe Basin Water Quality Control Plan 37 (1980).

Because the federal antidegradation policy focuses on changes in water quality, applicability of the test may not necessarily be triggered by a proposed relaxation of water quality objectives. For example, if a water quality objective adopted in 1975 has never been achieved, and a new standard is proposed based upon the highest level of water quality actually achieved since 1975, the federal antidegradation policy would not apply. No actual reduction in water quality would be authorized.

On the other hand, if water quality has declined since 1975, and a new water quality objective is based upon the existing, lower level of water quality, the federal antidegradation policy would be applicable. Applicability of the federal antidegradation policy does not depend upon the type of proceeding involved, and therefore does not depend upon whether changes in water quality are authorized beforehand or accepted after the fact.

Basin planning decisions may trigger the applicability of the federal antidegradation policy, even if no change in water quality objectives is proposed. For example, changes in discharge prohibitions or other changes in implementation measures may cause a reduction in water quality. EPA guidance on the federal antidegradation policy indicates that the requirements of the policy must be satisfied if changes in wasteload allocations would result in a lowering of water quality. EPA, Questions & Answers on: Antidegradation 8.

EPA regulations do not specify the precise method by which a state must implement the federal antidegradation policy. See 40 C.F.R. §131.12(a). The State should seek to integrate the policy into its own procedures. In California, where state law emphasizes comprehensive planning and coordination of all factors that affect water quality, the federal antidegradation policy should be considered as part of planning decisions to the extent possible. See generally, Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program 4-5 (1969). In many cases, however, it would not be possible to apply the federal antidegradation policy, except as the most general guidance, as part of basin planning decisions.

Water quality control plans must establish water quality objectives which are generally applicable to a body of water or to segments of that body of water. For large bodies of water such as the waters of the Pacific Ocean within the boundaries of the State, or for streams with numerous tributaries, it is not possible to identify, as part of water quality planning, all

areas where existing water quality may be higher than a proposed water quality objective. Moveover, the potential social and economic benefits of discharges which might reduce water quality often will be too speculative to be given consideration as part of water quality planning for large areas. The State and Regional Boards can and should focus their attention on establishing objectives for those situations where objectives are most needed to assure protection of beneficial uses, postponing until later site-specific approvals the determination whether discharges in a particular area should be allowed to reduce water quality to the level set by these objectives. For example, new objectives could be adopted for toxic pollutants that apply throughout a region, or even statewide, even though many areas will have better water quality than that required by those objectives. The new objectives would establish a floor, but water quality would not be permitted to be reduced to the level set by the new objectives without a site-specific application of the federal antidegradation policy.

If the State and Regional Boards are aware that a change in water quality standards or implementation measures would permit specific projects, the applicability of the federal antidegradation policy to the changes in water quality caused by those projects should be considered. The State and Regional Boards should pay particularly close attention to the requirements of the federal antidegradation policy when water quality control plan amendments are sought in order to permit a particular discharge, a reduced level of treatment, or development within a particular area.

2. Permitting

The federal antidegradation policy will most frequently be applied in individual permitting decisions, including issuance of waste discharge requirements and NPDES permits. A proposed waiver of waste discharge requirements would also be subject to the federal antidegradation policy if the waiver would result in a lowering of surface water quality.

For example, waste discharge requirements for new discharges or expansion of existing discharges ordinarily will require preparation of an anlysis applying the federal antidegradation policy. EPA, Questions & Answers on: Antidegradation 6. Of course, if the issures have already been analyzed in detail as part of a water quality control plan amendment, it will not be necessary to prepare a new analysis for issuance of waste discharge requirements.

The federal antidegradation policy will also apply to some cleanup and abatement orders and remedial action plans. Where

cleanup order is issued in response to changes in surface water quality, which occurred after the 1975 effective date of the federal antidegradation policy, but the board issuing the order decides not to require a return to the preexisting water quality, the decision to allow lower cleanup levels should be justified in accordance with the federal antidegradation policy. Where a cleanup order is directed towards immediate or short-term cleanup operations, postponing until later any determination of the ultimate cleanup level required, application of the federal antidegradation policy may also be postponed.

The federal antidegradation policy should also be addressed in water right proceedings, including issuance of water right permits, if the result of those proceedings would be to allow a lowering of surface water quality which existed after the 1975 effective date of the federal antidegradation policy. See EPA Region 9, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12 at 4.

3. Waivers and Exceptions

The federal antidegradation policy is also applicable to special proceedings concerning proposed waivers or exceptions from otherwise applicable water quality objectives or control measures. Examples include proposed Ocean Plan exceptions. See generally, State Board, Water Quality Control Plan, Ocean Waters of California 11 (1983).

Ordinarily, provisions of the Clean Water Act which allow for variances of treatment requirements should not be interpreted to exempt the discharge from the federal antidegradation policy. See, e.g., State Board Order No. WQ 86-17 at 19-20; EPA Region 9, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12 at 2. The only exception is for waivers of effluent limitations for thermal discharges, pursuant to Section 316(a) of the Clean Water Act. 33 U.S.C. §1326(a). EPA guidance indicates that limitations developed under Section 316 of the Clean Water Act take precedence over any requirements of the federal antidegradation policy that would otherwise apply. EPA, Questions & Answers on: Antidegradation 11; see 40 C.F.R. §131.12(a)(4).

II. The Three-Part Test

Where the federal antidegradation policy applies, it does not absolutely prohibit any changes in water quality. The policy requires that any reductions in water quality be justified consistent with the three-part test established by the policy. State Board Order No. WQ 86-17 at 20.

Whether reductions in receiving water quality may be permitted consistent with the federal antidegradation policy often will depend upon the conditions existing in the specific waters affected, and the benefits of the proposed discharge. This site-specific balancing is consistent with the scheme established under the Porter-Cologne Water Quality Control Act for setting water quality objectives in issuing waste discharge requirements, or setting cleanup levels in cleanup and abatement orders. See Cal. Water Code §§13263, 13304. "Judicious action by the regional boards, based on the facts of different cases and different areas, is the key to establishment of water quality objectives and waste discharge requirements." Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program, Appendix A at 30. Similar considerations govern when pollution is established and hence govern determination of appropriate cleanup levels. See id. (note on definition of "pollution").

A. Instream Uses

The first part of the test established by the federal antidegradation policy requires that: "Existing instream water uses, and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. §131.12(a)(1). This part of the test is intended to establish an "absolute requirement that uses attained must be maintained." 48 Fed. Reg. 51409 (Nov. 8, 1983).

EPA has provided more guidance on the requirement for protection of instream beneficial uses than on any other aspect of the federal antidegradation policy. See EPA, Questions & Answers on: Antidegradation 2-7. In large measure, this part of the federal antidegradation policy serves to reinforce the requirements of other applicable EPA Water Quality Standards regulations. See 40 C.F.R. §§131.2, 131.10, 131.11.

In general, the State must assure full protection of existing instream beneficial uses, including the health and diversity of aquatic life. Reductions in water quality should not be permitted if the change in water quality would seriously harm any species found in the water, other than a species whose presence is aberrational. EPA, Questions & Answers on: Antidegradation 3.

In general, the requirement that existing instream uses be protected is not satisfied if existing instream beneficial uses will be impaired, even for a portion of a water body. Id. at 5. EPA recognizes an exception for fill operations, which necessarily will preclude continued use of the filled area by aquatic species. The other two parts of the three-part test established by the federal antidegradation policy still apply to fill operations. Id. Similar considerations may require some flexibility in applying the federal antidegradation policy to areas flooded by new reservoirs. While it may be possible to protect a cold water fishery in a portion of the

reservoir, maintaining conditions for a cold water fishery throughout the reservoir, including its shallowest waters, may not be feasible. The water quality necessary to fully protect instream beneficial uses should still be protected in other portions of the waterway downstream of the reservoir.

B. Public Interest Balancing

Where water quality is higher than necessary to protect existing instream beneficial uses, the second part of the test applies. This part of the test allows reductions in water quality, so long as existing instream uses are protected, if the State finds "that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." 40 C.F.R. §131.12(a)(2).

EPA has provided relatively little guidance on how this part of the test should be applied, except to indicate that the meaning of the test "will evolve through case-by-case application" by the State. EPA, Questions & Answers on: Antidegradation 8.

This part of the federal antidegradation policy may best be viewed as a balancing test. The greater the impact on water quality, the greater the justification in terms of economic or social development necessary to justify the change. The burden of proof, to demonstrate that the change in water quality is justified, should be on the project proponent. See State Board Resolution No. 68-16; EPA Region 9, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. §131.12 at 9.

The requirement that the change be justified based upon "important economic or social development in the area" is intended to convey the level of justification required. EPA, Questions & Answers on: Antidegradation 8. Cost savings to the discharger, standing alone, absent a demonstration of how these savings are necessary to accommodate important social and economic development, are not adequate justification. State Board Order No. WQ 86-17 at 22 n. 10.

The requirement that the development accommodated by a change in water quality be important "in the area in which the waters are located" is intended to assure that development be important within the general area, not just to a small segment of the local population. The analysis used to determine whether the change in water quality is justified therefore should focus on impacts on the community; if the justification offered for a change in water quality is that it makes a particular development proposal feasible, the importance of that development within the general area should also be analyzed. The reference to economic development "in the area" should not be read to preclude consideration of important development at locations that are far away from the affected waters, so long as it

is demonstrated that the change in water quality is in fact necessary to accommodate that development.

The State has some flexibility to determine what kinds of impacts constitute "important economic or social development" that may justify changes in water quality. For example:

- Accommodating existing development may be used as a justification for changes in water quality. If major employer within the community could not afford to keep its plant in operation without a relaxation of treatment requirements, that may justify a lowering of receiving water quality.

- Important water development and water conservation projects may be considered to be important social and economic development that justify a lowering of water quality. See generally Cal. Water Code §13000.

- Environmental protection may constitute important social development, justifying a change in water quality, even if no other social or economic benefits to the community are demonstrated. If a discharge point is moved to less sensitive waters, the improvement in water quality at the original discharge point may justify the reduction in water quality at the new discharge point.

Of course, the degree to which development must be important in order to justify a change in water quality will depend on the extent to which water quality will be lowered. Thus, even where a new, expanded or relocated discharge is clearly justified, the balancing required by the second part of the federal antidegradation policy's three-part test may require a higher level of treatment than would otherwise be required by applicable Clean Water Act requirements. Conversely, relatively small changes in water quality should not require the level of justification needed for greater changes. EPA intends that the federal antidegradation policy be applied so as to require that development have a relatively high level of importance in order to justify a lowering of water quality. But the policy should not be interpreted to require that a project provide a major source of new housing or employment if only a very small discharge or a minor increase in an existing discharge is proposed.

Obviously, the information needed to apply this part of the federal antidegradation policy will vary according to the particular case. See EPA Region 9, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12 at 10. Detailed water quality and economic analyses should be required only if the degree of water quality change is significant. Id. at 6. EPA Region 9 has issued guidance indicating the information it expects to be provided in cases requiring detailed analyses, but the information requirements

will vary according to the type of project, receiving water impacts, and the nature of the social or economic development made possible by the project. Id. at 9-11. The analyses should include consideration of alternatives that would reduce water quality impacts. Id. at 10. Ordinarily, the information necessary to apply the federal antidegradation policy will be provided as part of the environmental documentation prepared for a project. See generally 14 Cal. Admin. Code §§ 15064, 15125, 15126, 15252. Where the State and Regional Boards participate in determining the scope of environmental documentation, and the federal antidegradation policy applies to a project, the Boards should seek to ensure that the requirements of the federal antidegradation policy will be analyzed. See, e.g., id. §15082(b)(1). Where changes in water quality are proposed to accommodate changes in land use, the State and Regional Boards should take into consideration the policies established under the appliable general plan, prepared by the local city or county pursuant to the State Planning and Zoning Law, Cal. Gov't Code §65000 et seq., and the plans of any regional, state or interstate agency with responsibility for land use planning in the area.

The federal antidegradation policy specifies that reductions in water quality may be permitted only after compliance with all applicable requirements for public participation and intergovernmental coordination. 40 C.F.R. §131.12(a)(2). The policy also specifies that all other applicable Clean Water Act requirements for point source discharges, and "all cost-effective and reasonable best management practices for nonpoint source control" shall be achieved. Id. These requirements are implicit in the requirement that changes in water quality must be "necessary to accommodate important economic or social development." Id. The necessity for a change in water quality has not been demonstrated to the extent that other applicable Clean Water Act requirements have not been followed. Nor has the necessity for a change in water quality been demonstrated to the extent that reductions in water quality could be avoided by reasonable and cost-effective control measures.

C. Outstanding National Resource Waters

The third part of the test established by the federal antidegradation policy requires that the water quality of waters which constitute an outstanding National resource be maintained and protected. 40 C.F.R. §131.12(a)(3). This part of the test has only limited applicability, but where it is applicable, it is very restrictive. No permanent or long-term reduction in water quality is allowable in areas given special protection as outstanding National resource waters. 48 Fed. Reg. 51402 (Nov. 8, 1983).

To date, only a small number of water bodies have been formally designated as outstanding National resource waters. The only California water so designated is Lake Tahoe. But other California waters almost certainly qualify.

Outstanding National resource waters are "waters of exceptional recreational or ecological significance." Id. The category may include waters of exceptionally high quality. 48 Fed. Reg. 51402 (Nov. 8, 1983). Outstanding National resource waters may also include:

> "water bodies which are important, unique, or sensitive ecologically, but whose water quality as measured by traditional parameters (dissolved oxygen, pH, etc.) may not be particularly high or whose character cannot be adequately described by these parameters." Id.

The most obvious candidates for designation as outstanding National resource waters are Pacific Ocean waters designated as areas of special biological significance. The Ocean Plan already sets requirements for protection of these areas that are consistent with the strict requirements for protection of outstanding National resource waters. See State Board, Water Quality Control Plan, Ocean Waters of California 9 (1983).

Other possible candidates for designation as outstanding National resource waters include state and federally designated wild and scenic rivers, and the waters of state and federal wilderness areas, parks, and wildlife refuges. Waters are not necessarily outstanding National resource waters simply because they are in one of these categories. Nor should waters outside these areas be excluded from consideration. But waters in these areas should be given special consideration to determine whether they should be designated as outstanding National resource waters.

Outstanding National resource waters may be designated as part of adoption or amendment of water quality control plans. See, e.g., State Board, Lake Tahoe Basin Water Quality Plan 37. See generally Cal. Water Code §13241(b).

Even if no formal designation has been made, individual permit decisions should not allow any lowering of water quality for waters which, because of the exceptional recreational and ecological significance, should be given the special protection assigned to outstanding National resource waters. See generally id. §13263(a) (water quality standards may be set when waste discharge requirements are issued, so long as those standards are no less stringent than any standards set by the applicable water quality control plan). Accordingly, the State and Regional Boards should consider, as part

of individual permit decisions, whether the affected waters should be designated as outstanding National resource waters.

III. Related Doctrines

The federal antidegradation policy applies in addition to any other applicable requirements of state and federal law. Even where a lower level of treatment would be consistent with the federal antidegradation policy, all other applicable regulatory requirements still must be satisfied. See, EPA, Questions & Answers on: Antidegradation 7-9.

In particular, the anti-backsliding requirements of the federal Clean Water Act often will apply in cases where the federal antidegradation policy is applicable.

State Board Resolution No. 68-16, which incorporates the federal antidegradation policy, may provide the basis for additional requirements in specific cases.

A. Anti-backsliding

"Backsliding" refers to reductions in treatment levels required by NPDES permits. EPA regulations limit the circumstances under which modified or reissued permits may set less stringent effluent limitations than required by previous permits. 40 C.F.R. §§122.44(l), 122.62. The Water Quality Act of 1987 includes provisions intended to clarify the Clean Water Act's anti-backsliding requirements. See Clean Water Act §402(o), 33 U.S.C. §1342(o).

The new anti-backsliding provisions generally prohibit relaxation of effluent limitations previously established on the basis of best professional judgment. Id. §402(o)(1), 33 U.S.C. §1342(o)(1). But the prohibition does not apply if any of five listed exceptions is applicable. Id. §402(o)(2), 33 U.S.C. §1342(o)(2).

The anti-backsliding requirements of the Clean Water Act are triggered by changes in the effluent limitations required by the discharger's NPDES permit, not by changes in the level of treatment actually achieved or by changes in receiving water quality. For example, an industrial discharger who failed to install and operate treatment systems required by the discharger's NPDES permit ordinarily could not obtain a relaxation of effluent limitations, even though the federal antidegradation policy would not apply. See id. §402(o)(2)(E), 33 U.S.C. §1342(o)(2)(E). On the other hand, new or expanded discharges ordinarily will not be subject to the anti-backsliding provisions.

The new anti-backsliding provisions also specify limitations on when water quality based effluent limitations may be relaxed. See id. §402(o), 33 U.S.C. §1342(o). If applicable water standards are not being achieved, a relaxation of water quality based effluent

limitations may be permitted if the new effluent limitations are consistent with a revised waste load allocation which will achieve water quality standards. See id. §303(d)(4)(A), 33 U.S.C. §1313(d)(4)(A). If all other applicable water quality standards are being achieved, water quality based effluent limitations may be relaxed if the relaxation is consistent with the federal antidegradation policy. Id. §303(d)(4)(B), 33 U.S.C. §1313(d)(4)(B).

B. State Board Resolution No. 68-16

State Board Resolution No. 68-16 establishes similar requirements to the federal antidegradation policy. The State Board adopted Resolution No. 68-16, as part of state policy for water quality control, in response to a 1968 Department of Interior directive calling for adoption of state policies. See generally Zener, The Federal Law of Water Pollution Control, published in E. Dolgin & T. Guilbert, Federal Environmental Law 721-23 (1974). That Interior Department directive later became the basis of the federal antidegradation policy promulgated by EPA in 1975. EPA, Questions & Answers on: Antidegradation 1.

Like the federal antidegradation policy, State Board Resolution No. 68-16 is triggered by changes in water quality. But the state policy has broader applicability. It applies to all waters of the State, not just waters of the United States. See State Board Resolution No. 68-16; State Board Order No. WQ 86-8. State Board Resolution No. 68-16 also applies to changes in water quality which occurred after its 1968 adoption date, not just to changes which occurred after the federal antidegradation policy took effect in 1975.

Where the federal antidegradation policy does not apply, the requirements of State Board Order No. 68-16 are less specific than the three-part test set by the federal antidegradation policy. See State Board Order No. WQ 86-17 at 19.

Where the federal antidegradation policy does apply, both the three-part test established by the federal antidegradation policy and the express requirements of State Board Resolution No. 68-16 should be considered. Id. at 23 n. 11. In some cases, application of the three-part test established by the federal policy may not fully satisfy the requirements of State Board Resolution No. 68-16. For example, the State's policy expressly provides for reasonable protection of potential beneficial uses; the federal antidegradation policy does not. See State Board Resolution No. 68-16; EPA, Questions & Answers on: Antidegradation 12. But cf. 40 C.F.R. §131.10(j) (requirement, independent of the federal antidegradation policy, for analysis of the attainability of instream beneficial uses). In all cases where the federal antidegradation policy is applicable, State Board Resolution No. 68-16 requires that, at a minimum, the three-part test established by the federal

antidegradation policy must be satisfied. State Board Order No. WQ 86-17 at 17-18.

Attachments

cc: Fresno, Redding and Victorville
Regional Board Offices

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